No. 83-1477

In The

Supreme Court of the United States

October Term, 1983

WILLIAM NEZOWY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the majority of the United States Court of Appeals for the Third Circuit, while holding that cross examination of a defense witness by the Government at trial as to whether said witness had previously claimed the Fifth Amendment constitutional right to refuse to testify before the grand jury proceedings was trial error, erred to the substantial prejudice of petitioner, by holding that said trial error was subject to the harmless error determination of *United States v. Natale*, 526 F. 2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1975), in violation of this Honorable Court's holding in *Grunewald v. United States*, 353 U.S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957), which held that it was prejudicial error to permit cross examination of a witness as to a plea of his Fifth Amendment privilege before the grand jury, and which did not require a harmless error determination as enunciated in *United States v. Natale, supra*, to establish prejudice.

II. Whether, assuming that the harmless error rule of *United States v. Natale, supra*, is applicable to the case at bar, a new trial is required pursuant to said harmless error rule, as was held by the Honorable Judge Adams of the United States Court of Appeals for the Third Circuit in his dissenting opinion at bar.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 21, 1983.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported in ___ F. 2d ___ (Appendix, *infra* at 1a).

JURISDICTION

The judgment of the panel of the United States Court of Appeals for the Third Circuit was entered on December 21, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Sixth Amendments to the United States Constitution are involved. The statute involved is 18 U.S.C. §1001, which is set forth in the Appendix B at 26a.

STATEMENT OF THE CASE

Petitioner was charged with six (6) counts[1] of making false statements to the Immigration and Naturalization Service in violation of 18 U.S.C. §1001 and five (5) counts of collecting fees for his services in excess of those permitted by law, in violation of 18 U.S.C. §1422. In a trial by jury, he was convicted of three (3) of the six (6) counts[2] of making a false statement of the Immigration and Naturalization Service, violation of 18 U.S.C. §1001, and acquitted of the other counts.

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1. The petitioner was originally indicted on eleven counts of making false statements to the Immigration and Naturalization Service in violation of 18 U.S.C. §1001 and ten counts of collecting fees for his services in excess of those permitted by law, in violation of 18 U.S.C. §1422. Four counts of violating 18 U.S.C. §1001 were dismissed pretrial and on one count of violation of 18 U.S.C. §1001 the court directed a verdict of acquittal. Four counts of violating 18 U.S.C. §1422 were dismissed pretrial and the court directed a verdict of acquittal as to one count of violating 18 U.S.C. §1422. Six counts of violating 18 U.S.C. §1001 were submitted to the jury. Five counts of violation of 18 U.S.C. §1422 were submitted to the jury.

2. Petitioner was convicted of three counts of filing a false claim relating to each of the following aliens: Anna Kowal Knochowski, Barbara Pas Economopoulos and Janina Kotowska.

After sentencing[3] petitioner filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit. The Court of Appeals, in a two to one decision, affirmed petitioner's conviction.

The United States Court of Appeals for the Third Circuit, in a two-judge majority opinion, erroneously applying this Honorable Court's opinion in *Grunewald v. United States*, 353 U.S. 391 (1957), *held*[4] as follows:

> "[W]e hold that questioning of a witness by the Government as to whether he had previously claimed the constitutional right to refuse to testify at a grand jury proceeding will constitute trial error, subject only to a harmless error determination.
>
> Although we have concluded that the potential for prejudice required that the Government be precluded from questioning Kushnir on the use of her fifth amendment privilege, a careful examination of the record satisfies us that this potential for prejudice did not crystallize into that degree of prejudice which would compel a reversal of Nezowy's conviction."

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3. The petitioner was sentenced as follows: (a) Count 1, imprisonment for two (2) years with eligibility for parole after serving a term of six (6) months; (b) Count 4, five (5) years probation with certain terms and conditions; and (c) Count 8, five (5) years probation with certain terms and conditions.

4. The full text of the opinion of the United States Court of Appeals for the Third Circuit appears in the Appendix hereto at 1a-25a.

The majority for the United States Court of Appeals for the Third Circuit erroneously rested their holding of harmless error upon the decision of the United States Court of Appeals for the Second Circuit in *United States v. Natale*, 526 F. 2d 1160, 1171 (2d Cir. 1975).

The dissenting opinion of the Honorable Judge Adams of the Third Circuit Court of Appeals held as follows:

> "Adams, J. dissenting.
>
> The aims of justice are not served by disregarding popular wisdom. Whatever may be the precise legal construction given to the constitutional privilege against self-incrimination, the fact remains that 'taking the Fifth' and 'refusing to answer' have entered the everyday idiom as synonyms for guilt. Before a jury drawn from the community, the admission of evidence concerning invocation of the privilege at a grand jury hearing is irrelevant, inflammatory and invariably prejudicial.
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> * * *
>
> To the extent the majority would require reversal of a conviction following examination of a defendant about the self-incrimination privilege, I join in that ruling. However, because I have serious reservations about the harmless error rule adopted by the majority in the case of non-party defense witnesses as well as the majority's reading of the record, I respectfully dissent.
>
> * * *

I

> The question whether inquiry into the invocation of the Fifth Amendment privilege constitutes prejudicial error is before this Court for the first time. The Second and Eighth Circuits have held that questioning defense witnesses on this point is inappropriate and may require reversal of any ensuing convictions. In *United States v. Williams*, 464 F.2d 927, 930 (8th Cir. 1972).
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> * * *
>
> The record thus demonstrates that Kushnir was indeed a critical defense witness. Her close business association with Nezowy, in particular her attendance at meetings which Nezowy had with some of the Polish nationals, also establishes that she was a likely participant in any of the activities referred to in the indictments. Under these circumstances, I am unable to say that the jury could not have imputed wrongdoing to Nezowy as a result of having been informed of Kushnir's Fifth Amendment plea."[5]

The defense theory of the case was that each and every one of the three aliens in question, in fact wanted political asylum, and authorized petitioner to file for political asylum, and knew that petitioner was filing for political asylum.[5a]

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5. The full text of the dissenting opinion of Judge Adams of the United States Court of Appeals for the Third Circuit appears in the Appendix at 14a-29a.

5a. *See* footnote 2, *supra*.

The petitioner repeatedly testified on direct examination and on cross examination that all of the aliens had authorized him to file for political asylum. As to the three aliens, Barbara Pas Economopoulos, Anna Kowal Knochowski and Janina Kotowska, in each and every instance, the petitioner testified that said aliens had authorized him to file for political asylum and that they had not said to him that they did not want political asylum. The record reveals, as follows:[6]

> "Q. you testified that Anna Kowal [Knochowski] was advised by you that you were filing for political asylum and she assented. Is that correct? A. That's correct.
>
> * * *
>
> Q. . . .[W]hen you in fact filed for political asylum for Barbara Pas [Economopoulos] it is your testimony that Barbara Pas knew that this was going to happen and went along with that. Is that correct? A. Absolutely.
>
> * * *
>
> Q. And Janina Kotowska . . . as you just testified, that political asylum was the only option available to her to stay in this country and she assented. A. Absolutely."

The critical evidence in the defense case, in support of petitioner's testimony that Barbara Pas Economopoulos, Anna Kowal Knochowski and Janina Kotowska in fact wanted political

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6. *See* Appendix at 27a.

asylum, and in fact authorized petitioner to file for political asylum on behalf of the aliens, was the testimony of Anna Kushnir.[7]

Anna Kushnir's testimony was crucial in supporting petitioner's testimony in two respects. First, she was a specific fact witness as to whether or not specific aliens had told petitioner whether they wanted political asylum.[8] Second, she was a witness as to petitioner's habit, routine or practice of advising aliens as to their options under the Immigration Act. Her testimony in this regard was directly relevant to prove that the conduct of petitioner on particular occasions which she testified to, where petitioner in fact advised the aliens that he was filing a claim for political asylum on their behalf and that the alien assented, was in conformity with his habits, routine and practice on all occasions.[9]

Anna Kushnir's credibility was, thus, the bedrock upon which the defense rested its case, and upon which the defense sought

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7. *See* Appendix at 28a-30a. Anna Kushnir's testimony revealed that she was a partner of petitioner William Nezowy and an attorney by the name of Louis Konowal for the purpose of aiding aliens with their claims before the Immigration and Naturalization Service.

8. Anna Kushnir testified that she was present when petitioner interviewed an alien named Grech. She testified that petitioner advised the alien of all of his options, including political asylum; and that the said alien assented to a filing of political asylum. This testimony established the custom, practice and habit of petitioner in advising aliens of their options, including political asylum, and obtaining their consent before filing for political asylum. *See* Appendix at 28a-30a.

Anna Kushnir also testified relating to the alien Barbara Pas Economopoulos, in this regard she testified that she was present when Barbara Pas asked petitioner to withdraw her claim for political asylum. This testimony was offered in support of petitioner's testimony that Barbara Pas had authorized him to file for political asylum and when Barbara Pas had asked him to withdraw her request for political asylum he did so on the same day. *See* Appendix at 29a-30a.

9. *Ibid.*

to support the testimony of the petitioner, that he advised all the aliens in question that he was filing for political asylum and that the aliens wanted political asylum and authorized petitioner to file for political asylum on their behalf. In short, Anna Kushnir's testimony and Anna Kushnir's credibility were crucial to the defense efforts to persuade the jury that the petitioner was not guilty of filing claims for political asylum which the aliens did not want petitioner to file on their behalf.

The prosecution, in an improper and legally impermissible stroke, destroyed Anna Kushnir's credibility, and like a giant tidal wave, washed away, like grains of sand, the foundation upon which the petitioner sought to support his testimony and his plea of innocence.

The prosecution accomplished the destruction of Kushnir's testimony and her credibility by improperly eliciting,[10] on cross examination, that Anna Kushnir had been informed, before the grand jury that she was suspected of committing the same crimes of which petitioner was convicted, in violation of 18 U.S.C. §1001, and *that Anna Kushnir had invoked her Fifth Amendment privilege against self incrimination before the grand jury.* This testimony was elicited over repeated and vehement defense objection.

The United States Attorney argued that the Government sought to introduce evidence of the witness Kushnir's invocation of her Fifth Amendment privilege before the grand jury in order

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10. It must be emphasized that *the introduction of Kushnir's prior invocation of the Fifth Amendment was not inadvertent.* The matter was raised at sidebar after the trial judge had given the instruction excluding the testimony of the threat made to the witness at the grand jury by the Assistant United States Attorney. The defense vehemently objected. *See* footnote 2 of the dissenting opinion of the United States Court of Appeals for the Third Circuit, Appendix at 19a-20a. *See also,* 30a-32a, 33a.

to rebut a prior statement by the witness that she had been threatened by the Assistant United States Attorney with deportation. The record reveals that the trial judge specifically instructed the jury to *disregard* the witness Kushnir's testimony as to any threats. The Government, thus, had no basis to argue that they sought to impeach the witness by reference to her Fifth Amendment assertion before the grand jury because there was no evidence of record to impeach.[11] The trial judge instructed the jury *before* the Government sought to cross examine Kushnir as to her assertion of her Fifth Amendment privilege before the grand jury. The judge instructed the jury, as follows:

> "Members of the jury, Miss Kushnir said something about she had been threatened by an Assistant United States Attorney . . . I will instruct you to disregard her testimony in that regard." (Appendix C, 26a).

The Government prosecutor asked the witness Anna Kushnir the following questions about her invocation of[12] the privilege of self incrimination before the grand jury:

> "Q. Did you understand the rights he read to you that day? A. Yes.

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11. The Court of Appeals for the Third Circuit was apparently under the misapprehension that the evidence of the witness Kushnir's testimony as to the threats made against her had not been stricken from the record. The Court of Appeals considered this as the Government's justification for attempting to introduce the evidence of the witness Kushnir's invocation of her Fifth Amendment privilege before the grand jury. Even on the assumption that the testimony as to threat was in evidence the Court of Appeals' majority rejected this as a proper basis to cross examine as to the witness Kushnir's invocation of her Fifth Amendment privilege before the grand jury (Appendix at 7a-8a).

12. *See* Appendix at 30a.

Q. Didn't you in fact invoke your Fifth Amendment right that day? A. I'm sorry.

Q. Did you in fact invoke your Fifth Amendment privilege which he advised you of that day? A. Yes."[13]

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13. The above testimony was put before the jury immediately after the Government was permitted to read the entire accompanying initial colloquy before the grand jury, including the following:

> "Q. . . . I would like to advise you of the following. . . . That grand jury investigation involves a charge in violation of Title 18, United States Code, Section 1001, which is false claims to a federal agency. A. Yes.
>
> • • •
>
> Q. . . . I also advise you, you should consider yourself a suspect regarding this investigation. Now, Miss Kushnir, are you represented by counsel? A. No." (Appendix, 31a-32a).

The Court of Appeals for the Third Circuit did not take note of this critical evidence directly linking the witness' guilt with the petitioner's guilt.

REASONS FOR GRANTING THE WRIT

I.

The majority of the United States Court of Appeals for the Third Circuit, while holding that cross examination of a defense witness by the Government at trial as to whether said witness had previously claimed the Fifth Amendment constitutional right to refuse to testify before the grand jury proceeding was trial error, erred to the substantial prejudice of the petitioner, by holding that said trial error was subject to the harmless error determination of *United States v. Natale*, 526 F. 2d 1160 (2nd Cir. 1975), *cert. denied*, 425 U.S. 950 (1976), in violation of this Honorable Court's holding in *Grunewald v. United States*, 353 U.S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957), which held that it was prejudicial error to permit cross examination of a witness as to a plea of his Fifth Amendment privilege before the grand jury, and which did not require a harmless error determination as enunciated in *United States v. Natale, supra.*

This case presents squarely for review the issue of whether this Honorable Court's landmark decision in *Grunewald v. United States*, 353 U.S. 391 (1957), under the "*circumstances of the case*" at bar, requires reversal of petitioner's convictions, because the Government deliberately, on cross examination, elicited, over defense objection, the fact that a critical defense witness, Anna Kushnir, had invoked her privilege against self incrimination before the grand jury.[14]

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14. This case was a case of first impression before the Court of Appeals for the Third Circuit (Appendix, 15a). This case is a case of first impression before this Honorable Court insofar as it involves improper cross examination of a defense witness rather than improper cross examination of a defendant. The majority of the Court of Appeals did not rely on this factual distinction in arriving at its conclusion.

This Honorable Court's decision in *Grunewald v. United States, supra,* requires reversal of the instant case. *Grunewald v. United States, supra,* does not permit a finding of no prejudice under the "*circumstances of the case*" at bar. *Grunewald v. United States,* does not hold that the questioning of a witness by the Government as to the witness invocation of the Fifth Amendment privilege against self incrimination before the grand jury is subject to a harmless error determination, as adopted in *United States v. Natale,* 526 F. 2d 1160 (2d Cir. 1975), and as adopted by the two judge majority of the Court of Appeals for the Third Circuit in the case at bar.[15]

In *Grunewald v. United States, supra,* this Honorable Supreme Court held that:

> "*[U]nder the circumstances of this case* it was prejudicial error for the trial judge to permit cross examining of petitioner on his plea of the Fifth Amendment privilege before the grand jury." 353 U.S. at 424 (Emphasis supplied.)

The "*circumstances of the case*" to which the quote from *Grunewald v. United States, supra,* refers, and upon which this Honorable Court premised its finding of prejudice, were that the petitioner in *Grunewald,* who had been cross examined at trial by the prosecutor as to his invocation of his Fifth Amendment privilege against self incrimination before the grand jury; was "not a voluntary witness" before the grand jury, was "not represented by counsel" before the grand jury, and was a potential suspect or defendant before the grand jury. In *Grunewald v. United States, supra,* this Honorable Court in referring to the "*circumstances of the case*" upon which it based its decision, stated:

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15. *See* Appendix at 9a-13a.

"First, Halperin repeatedly insisted before the grand jury that he was innocent and that he pleaded his Fifth Amendment privilege solely on the advice of counsel.

Second, the Fifth Amendment claim was made before a grand jury where Halperin was a compelled, and not a voluntary, witness; where he was not represented by counsel; where he could summon no witnesses; and where he had no opportunity to cross examine witnesses testifying against him. These factors are crucial in weighing whether a plea of the privilege is inconsistent with later exculpatory testimony on the same questions, for the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment. See Griswold, supra, at 62. Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judically supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.

Finally, and most important, we cannot deem Halperin's plea of the Fifth Amendment to be inconsistent with his later testimony at the trial because of the nature of this particular grand-jury proceeding. For, when Halperin was questioned before the grand jury, he was quite evidently already considered a potential defendant.

* * *

> We hold that under the circumstances of this case it was prejudical error for the trial judge to permit cross-examination of petitioner on his plea of the Fifth Amendment privilege before the grand jury, and that Halperin must therefore be given a new trial." (Emphasis supplied, *Grunewald, supra,* 353 U.S. 422-424.

The two judge majority of the Court of Appeals for the Third Circuit misconstrued the meaning of the words "*circumstances of the case*" as used by this Honorable Court in the above quote from *Grunewald v. United States, supra.* The majority of the Court of Appeals in arriving at its decision did not look to the quote, "*circumstances of the case*" mandated by *Grunewald, i.e.*, that the witness was not a voluntary witness before the grand jury, that the witness did not have counsel before the grand jury, and that the witness was considered a potential suspect or defendant of the grand jury investigation.[16] The majority of the

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16. In the case at bar, as in *Grunewald, supra,* the witness who was erroneously and improperly cross examined by the Government as to the invocation of the Fifth Amendment privilege before the grand jury was not a voluntary witness before the grand jury, was not represented by counsel before the grand jury, and was considered a potential suspect or defendant at the time the witness appeared before the grand jury. At bar, as in *Grunewald, supra,* the Government was allowed to improperly cross examine the witness over defense objection. In *Grunewald,* the judge charged the jury that petitioner's Fifth Amendment pleas could only be taken as reflecting on his credibility and that no inference could be drawn therefrom as to the guilt of petitioner or his co-defendants. The case at bar is more egregious than *Grunewald,* since the judge gave no charge to the jury as in *Grunewald.* The case is also more egregious than *Grunewald* because the prosecutor, immediately prior to cross examining the defense witness on her invocation of the Fifth Amendment privilege before the grand jury read from the grand jury to the trial jury, informing the trial jury that said witness was suspected of committing the very same crimes for which petitioner was on trial. The jury at bar, even more than the jury in *Grunewald* was thus left free to draw the inference of the guilt of the witness and of petitioner. *See* footnote 13, *supra. See also,* footnotes 10 and 11, *supra.*

Court of Appeals for the Third Circuit looked to the "*circumstances of the case*" totally different from those mandated by *Grunewald, supra.* Relying on *United States v. Natale*, 526 F. 2d 1160 (2d Cir. 1975), the Court of Appeals for the Third Circuit originally adopted the harmless error rule of *United States v. Natale, supra,* stating, as follows:

> "In *United States v. Natale,* 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976), the Second Circuit restated its rule on harmless error which is instructive in this situation. There, the court found that error resulting from fifth amendment cross examination was harmless when (1) the witness' testimony was remote from the crime charged, and (2) there was no likelihood that the jury would have become confused and would link the defendant [here Nezowy] to the witness [here Kushnir's] assertion of the privilege." *Id.* at 1171. *See* Appendix A at 9a.

Clearly, under *Grunewald v. United States, supra,* the harmless error rule of *United States v. Natale, supra,* had no applicability.

The Circuit Court of Appeals cases relied on by the majority of the Court of Appeals for the Third Circuit in arriving at a decision in the instant case clearly supports petitioner's argument that *Grunewald v. United States, supra,* requires reversal of the conviction without a finding of harmless error as enunciated in *United States v. Natale, supra.*

In arriving at its holding that, although the cross examination of the defense witness at bar, Anna Kushnir, was trial error, and improper, it was nonetheless harmless error, the two judge majority of the Court of Appeals for the Third Circuit relied

primarily upon *United States v. Natale, supra,* and also cited *United States v. Williams,* 454 F. 2d 927 (8th Cir. 1972).

Both *United States v. Williams, supra,* and *United States v. Natale, supra,* clearly support petitioner's argument that *Grunewald v. United States, supra,* requires reversal without a determination of harmless error as enunciated in *United States v. Natale, supra.*

In *United States v. Williams, supra,* the Court of Appeals for the Eighth Circuit, confronted with a substantially identical issue to the one at bar, held that it was prejudicial error to cross examine a defense witness as to whether said witness invoked his Fifth Amendment privilege against self incrimination before the grand jury. In so holding the Court of Appeals for the Eighth Circuit specifically relied on *Grunewald* and the "*circumstances of the case*" of *Grunewald, i.e.,* that said witness was not a voluntary witness, was not represented by counsel before the grand jury.[17]

United States v. Natale, supra, also supports petitioner's argument that *Grunewald v. United States, supra,* requires reversal

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17. At bar, as in *Williams,* defense counsel objected to the improper cross examination as to the witness' invocation of his Fifth Amendment privilege before the grand jury. At bar, as in *Williams,* the Government persisted in its efforts to present this improper evidence to the jury (*see* footnotes 10-13, *supra*). At bar, as in *Williams* and *Grunewald, supra,* the defense witness who was cross examined was not a voluntary witness before the grand jury and was not represented by counsel before the grand jury. (*See* footnote 1, *supra.*) The case at bar is even more egregious than *Williams,* in that the prosecution read from the grand jury transcript informing the trial jury that the defense witness who was improperly cross examined, was a suspect of the same offenses of which petitioner was being tried. Thus, the trial jury was free to infer petitioner's guilt from the fact that the witness had invoked her Fifth Amendment privilege against self incrimination before the grand jury.

of petitioner's conviction without a determination of harmless error. The Court of Appeals for the Second Circuit in *Natale, supra,* specifically stated, relying on *United States v. Williams, supra,* that it was prejudically erroneous for a prosecutor to *directly* ask a defense witness whether that witness had invoked his Fifth Amendment privilege against self incrimination before the grand jury. The Court of Appeals in *Natale* stated, as follows:

> "Where a prosecutor directly asks a defense witness at trial whether the witness refused to answer questions at the grand jury proceedings because the answers might have tended to incriminate him, courts have found prejudicial error and reversed the convictions. *See, e.g., United States v. Williams,* 464 F.2d 927 (8th Cir. 1972); *cf. United States v. Glasser,* 433 F.2d 994, 1005 (2d Cir.), *cert. denied,* 404 U.S. 854, 92 S.Ct. 96, 30 L.Ed.2d 95 (1971). Such direct efforts to impeach a defense witness are improper under *Grunewald v. United States,* 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957), where the Supreme Court reversed a conviction because the prosecutor had improperly cross-examined a defendant as to the assertion of his Fifth Amendment privilege before a grand jury. The salutary ruling of *Grunewald* was based on that view that the question prejudiced the credibility of the defendant without sufficiently bearing on the truth of the testimony he had given at trial. *Id.* at 423-24, 77 S.Ct. 963." *United States v. Natale, supra,* at 1171.

The Court of Appeals in *Natale* distinguished *Grunewald* and applied a harmless error rule because the facts of *Natale* did not involve a *direct* question as to whether the witness therein had invoked a Fifth Amendment privilege before the grand jury. The

facts in *Natale* involved a question as to whether the witness had testified before the grand jury under a grant of immunity. The Court in *Natale* stated, in pertinent part, as follows:

> "This case differs from *Grunewald* and its progeny, however, because here the reference to the constitutional privilege was neither direct nor clear. This incidental reference to immunity provided before the grand jury was not itself framed as a question, but rather was contained in the question being asked. It was not flagged before the jury as it was in *Grunewald* and *Williams*. It was not even objected to at trial. The prosecutor's naughty words were in effect a flyspeck on this record, not a blot.
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> * * *
>
> The fact that immunity is provided does not always imply that a Fifth Amendment refusal to testify has first occurred.
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> * * *
>
> It would be wholly speculative to attribute to these lay jurors an understanding of the reference to immunity *en passant* as anything more than a description of the grand jury procedure. Here, moreover, the trial judge after only three questions and answers read by the prosecutor from the grand jury testimony (bearing on Lapin's representation of appellants and acquaintance with Conti) struck the line inquiry altogether." *United States v. Natale*, at 1172.

At bar, as distinguished from *Natale*, there was a direct and clear question as to whether the defense witness had invoked the Fifth Amendment privilege before the grand jury.[18] At bar, as distinguished from *Natale* the defense counsel objected to the improper cross examination. At bar, as distinguished from *Natale*, the trial judge did not strike the improper cross examination from the record.[19] At bar, as distinguished from *Natale*, the prosecution placed evidence before the trial jury by reading from the grand jury transcript[20] that the defense witness who had invoked her Fifth Amendment privilege before the grand jury was a suspect of the very same crime for which petitioner was on trial.

Patently, *United States v. Natale, supra,* is both legally and factually distinguishable from the case at bar. Equally as patent, is the conclusion that *Grunewald v. United States, supra; United States v. Williams, supra,* and *United States v. Natale, supra,* require reversal of petitioner's conviction without reference to the harmless error rule enunciated in *Natale.*

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18. *See* footnotes 12 and 13 and accompanying text, *supra.*

19. *See* footnote 2, Appendix at 19a-20a.

20. *See* footnote 13, *supra.*

II.

Assuming that the harmless error rule of *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976) is applicable to the case at bar, a new trial is required pursuant to said harmless error rule, as was held by the Honorable Judge Adams of the United States Court of Appeals for the Third Circuit in his dissenting opinion at bar.

In a well reasoned and articulate dissent the Honorable Judge Adams of the Court of Appeals for the Third Circuit, in applying the harmless error rule of *United States v. Natale, supra,* concluded that the trial jury would have imputed wrongdoing to the petitioner as a result of having the evidence of the defense witness' invocation of her Fifth Amendment privilege against self incrimination before the grand jury placed before them by the prosecutor.

Petitioner adopts all of the legal arguments and factual analysis of the dissenting opinion of the Honorable Judge Adams, and prays that this Honorable Supreme Court grant a writ of certiorari.

The petitioner respectfully points out to this Honorable Court in urging that petitioner be granted the writ of certiorari; that both the majority and dissenting opinion of the Court of Appeals for the Third Circuit overlooked a most crucial and critical fact in reaching their respective opposite conclusions, as to the presence of prejudicial error at bar under the test as enunciated in *United States v. Natale, supra.*

Both the majority decision and dissenting opinion overlook the fact that the prosecutor immediately before asking the defense witness whether the witness had invoked the privilege for self incrimination before the grand jury, was allowed to read from the grand jury transcript and inform the trial jury that the said

witness was a suspect involving violations of 18 U.S.C. §1001, false claims to a federal agency.[21] The trial jury was thus informed that the defense witness was a suspect of the same crime for which petitioner was on trial.

Under the test enunciated in *Natale* the witness' testimony could not be considered remote from the crime charged when the jury was informed that the witness was a suspect of committing the very same crimes as petitioner. Further, there could be no doubt, with the jury's knowledge of said fact that the jury did become confused and link the assertion of the privilege by the witness with petitioner's guilt. It is clear beyond peradventure that the jury in the case at bar did in fact find that the petitioner was guilty by linking petitioner to the witness' assertion of the right against self incrimination.

It is respectfully submitted that a writ of certiorari should be granted in the case at bar.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

STEPHEN ARINSON
Attorney for Petitioner

NATALE F. CARABELLO, JR.
On the Petition

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21. *See* footnote 13, *supra.*

APPENDIX A—OPINION OF THE COURT OF APPEALS

GARTH, *Circuit Judge:*

William Nezowy appeals from convictions on three counts of making false statements to the Immigration and Naturalization Service (INS) in violation of 18 U.S.C. §1001 (1976).[1] Although we conclude that the district court erred in allowing the government to cross-examine a defense witness about invocation of her fifth amendment privilege against self-incrimination, we find this error to be harmless and therefore affirm.

I.

Nezowy acted as a self-proclaimed "immigration consultant" on behalf of certain Polish nationals. He was associated with Louis Konowal, an attorney, who represented clients before the INS. Nezowy was fluent in Polish and would often accompany clients to INS interviews as a translator.

The government charged that Nezowy, unbeknownst to Konowal, filed application forms with the INS seeking political asylum for his clients. The clients, it was alleged, were not aware that Nezowy was seeking political asylum on their behalf, and

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1. 18 U.S.C. §1001 (1976):

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

in fact had specifically denied Nezowy permission to make such a claim. After receiving complaints about Nezowy's activities, the INS arranged for an INS official who understood Polish to conduct an applicant interview, with Nezowy present as an interpreter. The INS official testified at trial that Nezowy failed to translate accurately the conversations with his client, deleting all references to "political asylum," and thereby hiding the fact that the client did not wish to apply for such asylum.

The amended indictment charged that Nezowy filed false applications on behalf of Anna Knockowski, Anna Lonczak, Barbara Pas Economopoulos, Bozema Lapinska, Janina Kotowska, and Marian Grech. It also alleged that Nezowy, in violation of 18 U.S.C. §1422 (1976),[2] collected fees for his services in excess of those permitted by law from all except Lonczak. Nezowy was convicted of filing false applications on behalf of Knochowski, Economopoulos, and Kotowska. He was acquitted on all other counts.

II.

As a preliminary matter, we observe that, contrary to Nezowy's contention, there was clearly sufficient evidence to support these convictions. At trial, Nezowy admitted that he had

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2. 18 U.S.C. §1422 (1976):

> Whoever knowingly demands, charges, solicits, collects, or receives, or agrees to charge, solicit, collect, or receive any other additional fees or money in proceedings relating to naturalization or citizenship or the registry of aliens beyond the fees and moneys authorized by law, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

filed for asylum for a number of Polish nationals, including Anna Knochkowski, Barbara Pas Economopoulos, Janina Kotowska, and Marian Grech. Yet all testified that they had not authorized Nezowy to do so. Indeed, Anna Knochowski testified that she specifically told Nezowy that she did not want political asylum, App. at 322. Ms. Economopoulos also testified that she told Nezowy that she did not want political asylum. App. at 407-08, as did Ms. Kotowska. App. at 654. This testimony without more is sufficient to sustain a verdict that Nezowy filed political asylum applications without the clients' knowledge or permission, and consequently made false statements to the INS.

III.

The only issue which requires discussion on this appeal is whether the district court judge erred in allowing the United States Attorney to cross-examine a defense witness about her invocation of the fifth amendment privilege.[3]

A.

The defense consisted in part of the testimony of Anna Kushnir, Nezowy's part-time secretary. The bulk of Kushnir's testimony concerned the office practices and fiscal and accounting procedures of the Nezowy—Konowal enterprise. Nezowy offered Kushnir's testimony to discredit Konowal's testimony on behalf of the government that he (Konowal) was unaware of Nezowy's activities and that he never derived any fees from them. Kushnir

3. Nezowy raised two other issues on appeal. He challenged the sufficiency of the evidence, and he claimed that the trial judge erred in failing to instruct the jury on concealment and authorization. We find no merit in either of these two contentions.

also stated that she was present at a meeting between Nezowy and Marian Grech in which she heard Grech consent to the filing of a political asylum petition. App. at 1185-86. Kushnir testified further that she was in the room with Nezowy when he had a conversation with Barbara Economopoulos and Ms. Economopoulos' husband. The only arguably relevant portion of that meeting related by Kushnir, however, was when Ms. Economopoulos asked "whether her political asylum application had been withdrawn," to which Nezowy replied: "Yes, it had been right after you made your phone call." App. at 1177. Kushnir acknowledged that she was not a party to the entire conversation but only overheard small fragments of it.

In addition, Kushnir testified that, while appearing before the grand jury as a possible suspect in the investigation, a member of the U.S. Attorney's Office had threatened her with denaturalization and deportation if she did not cooperate in the investigation. App. at 1187. The Government, over Nezowy's objection, sought to rebut the allegation that Kushnir had been so harassed and badgered. It did so by questioning Kushnir about the invocation of her fifth amendment privilege on that day:

> Q. Miss Kushnir, did you understand the rights Mr. Finkelstein [the Assistant U.S. Attorney] read to you that day? A. I was very confused because like I said, he interrogated me before we went in.
>
> Q. Did you understand the rights he read to you that day? A. Yes.
>
> Q. Did you in fact invoke your Fifth Amendment privilege which he advised you of that day? A. Yes.

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Q. And that was before the same Mr. Finkelstein who had been badgering you. A. Yes.

App. at 1214. Nezowy contends that this mode of impeachment of a witness was unduly prejudicial and thus should result in a reversal of his conviction.

B.

The general rule, of course, is that the mode of impeachment of a witness is a matter committed to the discretion of the trial court. *E.g., United States v. Cahalane,* 560 F.2d 601 (3d Cir. 1977). In *Grunewald v. United States,* 353 U.S. 391 (1957), however, the Supreme Court held that it was impermissible for the Government to demonstrate that a defendant's testimony was inconsistent by questioning the defendant about his prior invocation of the fifth amendment privilege.

The defendant in *Grunewald* testified at trial in a manner completely consistent with his innocence. The Government then sought to cross-examine him about his prior invocation of the fifth amendment privilege before the grand jury, contending that the defendant's claim of the privilege constituted a prior inconsistent statement. The *Grunewald* Court, however, held that there was no inconsistency between protestations of innocence and invocation of the fifth amendment privilege. The danger that the jury would draw improper inferences from the invocation of the privilege led the Court to conclude that the trial judge had erred in allowing this mode of impeachment.[4]

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4. The Court stated in part:

> We are not unmindful that the question whether a prior statement is sufficiently inconsistent to be allowed to go to

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The *Grunewald* Court did not go so far as to fashion a blanket rule which would always preclude the admissibility of this form of impeachment. Rather, it chose to pin its decision on the particular facts of Grunewald case,[5] but in doing so implied that great caution must be exercised in accepting such testimony.

The government argues, however, that the actual inconsistency reflected in Kushnir's testimony is more sharply drawn in this

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> the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true inconsistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter completely. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. Weighing these factors, therefore, we feel that we should draw upon our supervisory power over the administration of federal criminal justice in order to rule on the matter.

Grunewald, 353 U.S. at 423-24.

5. Four Justices, headed by Justice Black, would have made the rule absolute. In Justice Black's concurrence, he stated that:

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case than in *Grunewald*, in that Kushnir's invocation of the fifth amendment privilege directly rebuts her claim that she was harassed by the U.S. Attorney during the grand jury investigation. The government contends that Kushnir's claim of privilege is a clear indication that she "was capable of standing up to the government," and therefore the trial cross-examination was proper as a direct contradiction to her claim of harassment. We cannot agree.

The fact that the U.S. Attorney *warned* Kushnir of her fifth amendment rights might perhaps be probative in determining whether he "harassed or badgered" her. Whether Kusnir actually *invoked* the privilege, however, is simply irrelevant to the question of whether she was in fact harassed by the Government. It is every bit as conceivable for a badgered witness to invoke fifth amendment rights out of fear as it is to have a non-badgered witness invoke the right out of confident defiance. The trial cross-examination, therefore, had little relevance in rebutting any assertion that Kushnir had been harassed. Moreover, whether Kusnir was harassed or not was itself merely a tangential issue. Whatever probative value could have been eked out of this

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> I agree with the Court that use of the claim of constitutional privilege to reflect upon [defendant's] credibility was error, but I do not, like the Court, rest my conclusion on the special circumstances of this case. I can think of no special circumstance that would justify use of a constitutional privilege to discredit or convict a person who asserts it . . . It seems incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution.

Id. at 425-26 (Black, J., concurring).

testimony is more than outweighed by the potential prejudical effect of admitting testimony regarding a fifth amendment claim of privilege before a jury. The danger is far from negligible, as the *Grunewald* Court saw it, that "the jury [would make] impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt. . . ." 353 U.S. at 423-24. Here, as in *Grunewald*, we find that the balance tilts convincingly toward inadmissibility.

Because of the ever present danger that a jury might misunderstand the context in which such fifth amendment questioning occurs, and because such inquiries, invariably challenged at trial and questioned on appeal no matter how well-intentioned, may infect an entire trial which is otherwise free from error, and because we too find it difficult to imagine any circumstance where such examination would be relevant and appropriate, we hold that questioning of a witness by the Government as to whether he had previously claimed the constitutional right to refuse to testify at a grand jury proceeding will constitute trial error, subject only to a harmless error determination.[6]

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6. Our holding, i.e. that questioning by the government concerning a witness' fifth amendment claim of privilege before a grand jury will constitute trial error, obviously includes a *defendant party* as well as a *non-party witness*. We emphasize, however, that the issue presented in this case involves only the corrective action required when a non-party, such as Kushnir here, is questioned. Thus, contrary to the intimations of the dissent (*see* dissent typescript at pp. 1-2), we have no occasion to address the adoption of any *per se* rule providing for automatic reversal in the event a defendant himself is questioned by the Government as to his fifth amendment privilege.

At least one other court of appeals subsequent to *Grunewald* has taken the position that, subject to a harmless error determination, questioning about use

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Although we have concluded that the potential for prejudice required that the Government be precluded from questioning Kushnir on the use of her fifth amendment privilege, a careful examination of the record satisfies us that this potential did not crystallize into that degree of prejudice which degree would compel a reversal of Nezowy's conviction.

In *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976), the Second Circuit restated its rule on harmless error which is instructive in this situation. There, the court found that error resulting from fifth amendment cross examination was harmless when (1) the witness' testimony was remote from the crime charged, and (2) there was no likelihood that the jury would have become confused and would link the defendant (here Nezowy) to the witness' (here Kushnir's) assertion of the privilege. *Id.* at 1171.[7]

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of the fifth amendment privilege is impermissible in all cases, whether the witness be the defendant or a disinterested third party. United States v. Natale, 526 F.2d 1160, 1171 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). *See also* United States v. Williams, 464 F.2d 927 (8th Cir. 1972); United States v. Glasser, 443 F.2d 994, 1005 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

Cf. United States v. Lacouture, 495 F.2d 1237, 1240 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974); United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973); Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), all of which hold that a criminal defendant is not entitled to call a witness for the purpose of having the jury hear him "take the Fifth."

7. In *Natale*, error was found harmless when the witness was asked whether he "testified before a grand jury under immunity." The connection between that question and the implication that the witness had invoked his fifth amendment privilege to refuse to testify was so attenuated, the court held, that no prejudice could have occurred. *Cf.* United States v. Williams, 464 F.2d 927 (8th Cir. 1972), where the Eighth Circuit stated that error could not be harmless when the

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In applying the *Natale* formulation of harmless error here, it first appears that Kushnir's testimony was remote and far removed from the crimes charged regarding Ms. Knochowski and Ms. Kotowska, since Kushnir made no statements directly concerning either alleged victim. Nezowy also claims, however, that the cross-examination discredited Kushnir's testimony, which was generally exculpatory since it tended to show that, contrary to the government's assertion, Nezowy acted with authorization from attorney Konowal. Whether or not Nezowy acted with authorization from Konowal, however, was not related to the actual crime of making a false statement for which Nezowy was charged. If Nezowy in fact made false applications for asylum, then whether Konowal did or did not authorize Nezowy's acts is irrelevant. The dispositive inquiry is whether the *clients* for whom asylum was sought authorized the activity.

Kushnir also testified that she heard Marian Grech give Nezowy permission to file for political asylum on his behalf. Unlike

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prosecutor attempted to discredit a "crucial" defense witness. *Id.* at 931. The witness in *Williams* had corroborated defendant's testimony that he [defendant] had given a truthful account of his prior criminal record to a firearms dealer in connection with the purchase of a gun. In *Natale*, a linchpin of the court's holding of harmless error was the Second Circuit's recognition that "the fact that immunity is provided does not always imply that a Fifth Amendment refusal to testify has in fact occurred. . . . It would be wholly speculative to attribute to these lay jurors an understanding of the reference to immunity *en passant* as anything more than a description of the grand jury procedure." *Natale*, 526 F.2d at 1172.

In the instant case, even if the jury would have recognized from her invocation of the fifth amendment privilege that Kushnir had declined to answer questions before the grand jury, in the unrelated context of the preceding and succeeding questions regarding harassment, the claim of privilege could not have been associated with Nezowy's guilt.

the previously mentioned testimony of "authorization," this evidence is clearly exculpatory. And indeed, it apparently did exculpate Nezowy, for the jury *acquitted* him of that charge, apparently giving full credit to Kushnir's testimony and rejecting Mr. Grech's own testimony that no such authorization had been given.

The only other statements of Kushnir to which we are directed concern the conversation among Nezowy, Barbara Pas Economopoulos, and Ms. Economopoulos' husband. Whatever testimony Kushnir gave respecting this conversation, however, was of relatively minimal probative value, since both Economopoulos and her husband carried concealed tape recorders at the behest of the INS. It was from these recordings that a transcript of the conversation was prepared. The jury listened to the tape, and, having been furnished with copies of the transcript, read the transcript of the tape as well. Therefore, Kushnir's version of the conversation was superfluous. Moreover, Kushnir admitted that she was not a participant in the conversation and that she had overheard only small portions of it.

It is therefore apparent to us that Kushnir's testimony was either given full credit when exculpatory, or else was so remote from the crimes charged against Nezowy that the first criterion of the *Natale* rule was fully satisfied. Even in the unlikely event that a jury would credit Kushnir's testimony in one instance but discredit it in another because of her invocation of the fifth amendment privilege before the grand jury, her testimony was at best tangential to the relevant issues in the case, except to the extent that it concerned Marian Grech — the count on which Nezowy was acquitted. Whatever arguable taint attached to her testimony, therefore, could not have worked to the detriment of the defendant Nezowy.

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As we have previously observed, the second *Natale* criterion presents the question of whether a likelihood of confusion would arise in the jury's mind which would link Nezowy to Kushnir's fifth amendment claim *See supra* text at p. 12 and note 7. We find it highly implausible that a jury could have impermissibly imputed Kushnir's invocation of her fifth amendment privilege to Nezowy. The improper cross-examination was a momentary one question exchange in the midst of a nine day trial. Kushnir was a low level employee who worked part-time in a clerical position. There was no suggestion during the trial that she was implicated in Nezowy's scheme. In the words of Judge Oakes writing for the Second Circuit in *Natale*, "the prosecutor's naughty words were in effect a flyspeck on this record, not a blot." *Natale*, 526 F.2d at 1172. We therefore conclude that no adverse inferences could have been drawn from this passing exchange which could in any way link Kushnir's invocation of her privilege to Nezowy's guilt.

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V.

We are satisfied that no substantial right of the defendant Nezowy was affected by the improper cross-examination of Kushnir.[8] Thus, the cross examination by the Government, while error, was harmless. *See* Fed. R. Crim. P. 52. As with the other contentions made on this appeal, *see supra* note 3, we find this contention of reversible error involving Kushnir's fifth amendment privilege to be without merit as well.

The judgment will be affirmed.

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8. Judge ADAMS would test Nezowy's conviction by the harmless error standard of Chapman v. California, 386 U.S. 18 (1967) and Fahy v. Connecticut, 375 U.S. 85 (1967) (constitutional error must be harmless beyond a reasonable doubt). We point out that both *Chapman* and *Fahy*, fashioning guidelines for determining whether constitutional errors are harmless, involved instances where it was the constitutional rights of the defendant himself that had been violated. *Chapman*, 386 U.S. 18 (prosecutor commented on defendant's failure to testify); *Fahy*, 375 U.S. 85 (evidence admitted which was seized in violation of defendant's fourth amendment rights). Here, of course, Nezowy himself was never questioned with respect to any claim of privilege.

Although Judge ADAMS has sought to equate the defendant's standard of harmless error found in *Chapman* with a third party witness, non-defendant standard, we are satisfied that, even if the *Chapman* standard were to apply, a proposition with which we have substantial question, we find that there is no reasonable possibility that the questioning of Kushnir might have contributed to the conviction. *See Fahy*, 375 U.S. at 86-87. Because, even under the *Chapman* standard, the error complained of was harmless, we have no occasion to formulate or discuss a third party witness, non-defendant standard in this case.

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ADAMS, J., dissenting.

The aims of justice are not served by disregarding popular wisdom. Whatever may be the precise legal construction given to the constitutional privilege against self-incrimination, the fact remains that "taking the Fifth" and "refusing to answer" have entered the everday idiom as synonyms for guilt. Before a jury drawn from the community, the admission of evidence concerning invocation of the privilege at a grand jury hearing is irrelevant, inflammatory and invariably prejudicial.

As I read the majority's opinion, it concedes that evidence concerning a Fifth Amendment claim before a grand jury is inadmissible. Relying on *Grunewald v. United States,* 353 U.S. 391 (1957), the majority first concludes that questioning a defendant about the invocation of this privilege creates an overwhelming presumption of prejudice and therefore cannot be sanctioned. The Court next holds that questioning a non-party defense witness regarding Fifth Amendment claims constitutes a trial impropriety, subject only to a harmless error determination. Applied to the facts of this case, the majority holds that defense witness Anna Kushnir's testimony was either "remote" from the crimes charged or was in any event "given credit" by the jury so that any error committed at trial was harmless.

To the extent the majority would require reversal of a conviction following examination of a defendant about the self-incrimination privilege, I join in that ruling. However, because I have serious reservations about the harmless error rule adopted by the majority in the case of non-party defense witnesses as well as the majority's reading of the record, I respectfully dissent.

Appendix A

I

The question whether inquiry into the invocation of the Fifth Amendment privilege constitutes prejudicial error is before this Court for the first time. The Second and Eighth Circuits have held that questioning defense witnesses on this point is inappropriate and may require reversal of any ensuing convictions. In *United States v. Williams*, 464 F.2d 927, 930 (8th Cir. 1972), the court declared:

> We hold that the prosecutor, through his question and argument relating to [key defense witness] Harris' invocation of the Fifth Amendment, injected prejudicial error requiring reversal.

Similarly, the Second Circuit in *U.S. v. Natale* announced the rule that:

> [w]here a prosecutor directly asks a defense witness at trial whether the witness refused to answer questions at the grand jury proceedings because the answers might tend to incriminate him, courts have found prejudicial error and reversed the convictions. . . . Such direct efforts to impeach a defense witness are improper under *Grunewald v. United States*. . . .[which] was based on that view that the question prejudiced the credibility of the defendant without sufficiently bearing on the truth of the testimony he had given at trial.

526 F.2d 1160, 1171 (2d Cir. 1975). *See also United States v. Glasser*, 443 F.2d 994, 1005 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

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While categorically rejecting prosecutorial inquiry into Fifth Amendment privilege, *Natale* does not adopt a per se rule of reversing all ensuing convictions. Rather, the Second Circuit would judge such prosecutorial misconduct harmless error if 1) the witness's testimony concerned events remote from the crime charged and 2) there was no likelihood of confusion in the jury's mind between the invocation of the privilege by the witness and the defendant's conduct. 526 F.2d at 1171. The majority opinion in the present case adopts the Second Circuit's *Natale* rule, but then relies upon an expansive view of its harmless error exception.

The *Natale* guidelines do not appear sufficient to guarantee a defendant's right to a trial free of prejudice. The privilege against self-incrimination protected by the Fifth Amendment is, of course, of constitutional magnitude. Its function is "to protect *innocent* [persons]," *Grunewald*, 353 U.S. at 421, and its invocation is therefore perfectly consistent with innocence. Under either the majority or minority view in *Grunewald*,[1] the line of questioning

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1. The *Grunewald* majority found that the prior invocation of the Fifth Amendment could be admitted into evidence only if there were a threshold preliminary inquiry by the trial judge:

> [P]rior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness. But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent.

353 U.S. at 418. Because asserting the privilege is consistent with innocence, *Grunewald* creates a heavy presumption against any cross-examination on this point. In the present case, the trial judge made no preliminary inquiry as required by the *Grunewald* majority.

Justice Black's concurrence in *Grunewald*, joined by three other Justices, went one step beyond the majority and adopted a per se rule:

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followed by the Nezowy prosecution has no place in a criminal proceeding. The *Grunewald* Court, however, did not address the possibility of a harmless error exception to its constitutional holding since both the majority and minority agreed that the resulting prejudice required reversal of the convictions.

I am reluctant to accept, as does the majority, that a simple harmless error standard is adequate to protect the defendant's right to a fair trial. Rather, assuming that a per se reversible error rule is not more appropriate, I believe that a strong argument can be advanced for placing upon the prosecution the burden of proving that the error in question was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). As the Supreme Court declared in *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963),

> The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

It is true, as the majority points out, that both *Chapman* and *Fahy* involved violation of a defendant's constitutional right. But this distinction between defendants and non-defendants does not settle the question whether the *Chapman/Fahy* standard applies to the present case. Instead, I believe that two independent arguments may be advanced for invoking stricter constitutional

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> I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it.

Id. at 425 (Black, J., concurring).

standards in cases in which testimony concerning Fifth Amendment privileges is introduced at trial.

First, the majority position provides no reason for distinguishing defendant from non-party witness testimony for constitutional purposes. It is correct as a basic proposition that "[o]rdinarily, one may not claim standing in this court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 341 U.S. 249, 255 (1953). This general consideration, however, may be "outweighed by the need to protect . . . fundamental rights," *id.* at 257, and is therefore not amenable to rigid application. In fact, different standards have been adopted for third party assertion of constitutional rights depending on the nature of the rights themselves. *Compare Alderman v. United States*, 394 U.S. 165, 174 (1969) (no vicarious raising of Fourth Amendment rights of others to suppress illegally seized evidence) with *NAACP v. Alabama*, 357 U.S. 449 (1958) (civil rights organization permitted to assert First and Fourteenth Amendment rights of its members).

Although a significant body of case law has developed concerning claims by criminal defendants of the Fourth Amendment rights of third parties, *see e.g., United States v. Salvucci*, 443 U.S. 83 (1980), there is no controlling body of precedent for the Fifth Amendment. What cases do exist turn on combined Fourth and Fifth Amendment claims for the suppression of evidence obtained as a result of interrogations without *Miranda* warnings or trial examinations of non-party witnesses who could have raised the Fifth Amendment privilege. *See, e.g., United States v. Fredericks*, 586 F.2d 470, 480-81 (5th Cir. 1978); *United States v. Skolek*, 474 F.2d 582, 585 (10th Cir. 1973); *Bryson v. United States*, 419 F.2d 695, 698 (D.C. Cir. 1969). These decisions are not applicable to the case at bar since our

concern is not with the evidentiary fruits of potentially privileged testimony but the infection of the triple process itself by the extraneous interjection of prejudicial testimony concerning the invocation of the Fifth Amendment.[2] The sole case addressing

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2. It must be emphasized that the introduction of Kushnir's prior invocation of the Fifth Amendment was not inadvertent. The matter was raised at side bar and resolved as follows:

> [U.S. Attorney] MS. SPEARING: Your Honor, I would like to inquire into [Kushnir's] taking the Fifth Amendment in the grand jury as to whether or not she answered truthfully in the grand jury. . . .
>
> Your Honor, if we could go back to the reason we asked for the side bar because we wanted to ask Miss Kushnir whether she answered questions or whether she in fact invoked her Fifth Amendment privilege so as to show she understood the advice and so on [U.S. Attorney] Mr. Finkelstein was giving her and is perfectly capable of standing up to the Government, contrary to the implication, and I simply did not want to create reversible error by somehow bringing out any evidence with respect to Fifth Amendment privilege in an improper context. I don't believe that it's improper, but I would like the Court to rule on that.
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> [Defense Attorney] MR. CARABELLO: It's my contention at this point — and what I intend to do so we can get a ruling immediately is, according to the ruling that you made, your Honor, concerning the testimony that she would —
>
> THE COURT: How does that impeach her credibility?
>
> MR. CARABELLO: Number one, I asked her —
>
> THE COURT: I know what you asked her. How does what she has been asked so far impeach her credibility? . . .

(Cont'd)

this precise point, *United States v. Colyer*, 571 F.2d 941, 946 (5th Cir.), *cert. denied*, 439 U.S. 933 (1978), assumes the applicability of the *Chapman* standard without further discussion.

As I see it, the question whether the prosecution's cross-examination of Kushnir necessitates the stricter standard of protection given to constitutional error is closely akin to the question of third-party standing. Under the case law governing jus tertii, a litigant may assert constitutional claims other than his or her own when the same act, "both injures [the litigant] and impinges upon the constitutional rights of third persons."[3]

(Cont'd)

> All right, the thing that's before me now is whether the Government can go on and read to her the testimony to bring out by questioning that she invoked her Fifth Amendment privileges and I think the better way to do it, rather than to read it from the statement, would be to ask her and I will permit the Government to ask her that question.
>
> MRS. AINSLIE: Fine.
>
> MR. CARABELLO: Note my objection.
>
> THE COURT: Why are you objecting?
>
> MR. CARABELLO: I think it's prejudicial, your Honor.

App. 1209-13.

3. Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 424 (1974). While the standing issue usually arises in bringing a controversy to court (as in First Amendment overbreadth cases), this Note ably analyzes the doctrinal confusion surrounding third-party claims:

(Cont'd)

By analogy, a criminal defendant may properly assert a third party constitutional claim, and therefore fall within the ambit of the stricter *Chapman* standard, if the constitutional claim raised is valid and trial error is committed. Under these circumstances, the validity of a constitutional claim would be governed by this Court's two-part test set forth in *Bowman v. Wilson*, 672 F.2d 1145, 1152-53 (3d Cir. 1982):

> For a peson who himself can allege injury in fact to be permitted to assert the constitutional rights of another, thereby seeking redress of both his own injury and that of the third party, two requirements must be satisfied. First, not only must there be a close relationship between the litigant and the person whose right he is asserting, but the activity the litigant proposes to pursue must be inextricably

---

(Cont'd)

> The patchwork of exceptions, based upon considerations of questionable force and relevance, seems to indicate both dissatisfaction with the presumption against assertion and a lack of coherent doctrine to guide the court in adjudicating jus tertii claims. A practice of permitting claimants to assert jus tertii when the injury of which they complain also deprives third parties of constitutional rights is necessary to ensure that such rights are fully protected. Such a practice would inject a greater degree of candor and consistency into Court decisions than is engendered by a rule most often honored in the breach. Finally, the suggested practice would permit the Court to turn its attention in jus tertii cases to the substantive constitutional claims presented without the risk of confusing the merits with procedural questions of standing.

Id. at 443.

> bound up with the constitutional right of the person from whom the right is drawn. *See Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976) (plurality). Second, there must exist some obstacle to the third party asserting his or her own rights. *Id.* at 115-16. If both requirements are met, a party who is injured by the conduct of another but is not the beneficiary of the constitutional right proscribing that conduct can nonetheless complain of that injury by asserting the right of the injured third party.

(footnotes omitted). It would appear that Nezowy's assertion of Kushnir's Fifth Amendment privilege satisfies both prongs of the Bowman inquiry.

A second, independent basis for applying the *Chapman/Fahy* standard is found not in the Fifth Amendment, but in the Sixth. Under the Sixth Amendment, a defendant must be able to confront witnesses or to introduce testimony to rebut evidence or inferences that could lead to a conviction. allowing inquiry into a defense witness's assertion of the self-incrimination privilege effectively deprives a criminal defendant of these Sixth Amendment rights. An inference of guilt cannot be rebutted since the witness may not be forced to explain the basis for having invoked the Fifth Amendment or to dispel the implications of guilt. *See Brink's, Inc. v. City of New York*, Nos. 82-7782, 82-7788, slip op. at 6424 (2d Cir., Sept. 6, 1983) (Winter, J., dissenting). Thus, the prosecution's questioning of Kushnir infringed upon important Sixth Amendment rights *of the defendant himself*. Regardless of whether Nezowy can assert a third party claim, this infringement of the Sixth Amendment independently provides him standing and would therefore appear to require application of the *Chapman* harmless beyond a reasonable doubt test.

Appendix A

If we were to apply the *Chapman* test, Nezowy's conviction could not withstand scrutiny. As this court previously held in *United States ex rel. Macon v. Yeager*, 476 F.2d 613, 616 (3d Cir. 1973), a conviction cannot be sustained when critical portions of the evidence are disputed and the case is not so overwhelming that the Court can conclude beyond a reasonable doubt that the constitutional error did not contribute to the conviction. I do not, however, reach the ultimate question of the application of the *Chapman* standard because an analysis of the record establishes that even under the majority's harmless error test a new trial is required.

II

Nezowy was charged with falsifying aslyum applications for six Polish nationals. He was convicted on three of the eleven counts. On its face, this division between convictions and acquittals suggests that witness credibility and detailed factual inquiries were of significance. The majority contends that the testimony of key defense witness Kushnir was "remote and far removed," typescript at 12, from the crimes charged. I cannot agree.

Kushnir testified that she was a business associate of Nezowy from 1972-78. She stated that she participated in interviews with Polish nationals seeking asylum while she was working as a paralegal and secretary with Nezowy and his associate, attorney Louis Konowal. App. at 1175. Ms. Kushnir further testified that she is fluent in Polish and was fully able to follow the conversations regarding the applications for altered immigration status. App. at 1180-81. She gave general exculpatory testimony concerning the business practices of Nezowy based upon her having been a party to a number of the allegedly criminal transactions. Moreover, she gave specific testimony regarding the events surrounding the

asylum applications of Pas and Grech: Nezowy was charged with having falsified both applications.

While Nezowy was acquitted on the charge of falsifying Grech's application, he was convicted on a similar charge with regard to Pas. The majority opinion seeks to minimize the value of Kushnir's testimony concerning what transpired with Pas. The record, however, reveals that Kushnir was familiar with Pas's file and that she testified that Pas had applied for asylum prior to meeting with Nezowy. App. at 1175-76. She further testified that Pas's first meeting was with Konowal, not Nezowy, and that at the one meeting she attended where Nezowy was present with Pas, Nezowy declared that Pas's asylum application had been withdrawn pursuant to her request. App. at 1174-77. Were the jury to have believed Kushnir regarding Pas's immigraton application, Nezowy could not have been convicted of falsifying her asylum request.

The record thus demonstrates that Kushnir was indeed a critical defense witness. Her close business association with Nezowy, in particular her attendance at meetings which Nezowy had with some of the Polish nationals, also establishes that she was a likely participant in any of the activities referred to in the indictments. Under these circumstances, I am unable to say that the jury could not have imputed wrongdoing to Nezowy as a result of having been informed of Kushnir's Fifth Amendment plea.

III

For the foregoing reasons, I respectfully dissent.

Appendix A

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

18 U.S.C. §1001 (1976):

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

APPENDIX C — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

Excerpt of Petitioner Nezowy's testimony that he informed all aliens that he was filing for political asylum and they agreed:

[Cross Examination of Petitioner William Nezowy commencing at p. 8.80]

* * *

Do I understand correctly, Mr. Nezowy, you say that you did file for political asylum on behalf of Anna Kowal, Barbara Pas, Marian Grech, Bozena Lapinska, and Anna Lonczak. A. Yes.

Q. You testified that Anna Kowal was advised by you that you were filing for political asylum and she assented.

Is that correct? A. That's correct.

* * *

[8.81] Q. All right, but at whatever time this took place when you in fact filed for political asylum for Barbara Pas it is your testimony that Barbara Pas knew that this was going to happen and went along with that.

Is that correct? A. Absolutely.

* * *

Appendix C

Excerpt of Anna Kushnir's testimony testifying that she went into law practice with Nezowy and Konowal:

[Direct Examination of Anna Kushnir commencing at p. 7.129]

* * *

Q. And what was the basis of this relationship? A. Mr. Konowal, Mr. Nezowy and myself got together and were going to go into a law practice.

* * *

Kushnir's testimony evidencing Nezowy explained to aliens, showing habit and custom of explaining that he was filing for political asylum:

[Direct Examination of Anna Kushnir commencing at p. 7.159]

* * *

Q. Did he explain the various options that may have been opened to Mr. Grech at that time? A. Yes, he did. He went down the line by saying, "Do you have a relative here, mother, father, brother, sister? You said you were an auto mechanic, but right now I can't remember exactly how long you said. How long have you been doing this type of work?"

* * *

Appendix C

[7.160] Q. Did Mr. Nezowy discuss anything else with him that you recall? Did he discuss the options, you say? A. Yes, he did discuss the options.

* * *

Q. Then what did he say? A. He said, "Well, there is political asylum, you know."

* * *

Q. Now did Mr. Grech understand what Mr. Nezowy was talking about?

* * *

[7.161] BY MR. CARABELLO:

Q. Did Mr. Nezowy tell him the only option was political asylum? A. Yes, he did.

* * *

Kushnir's testimony that Barbara Pas Economopolos told Nezowy to withdraw political asylum claim:

[Cross Examination of Anna Kushnir commencing at p. 7.194]

* * *

Q. Isn't it a fact that during that conversation Barbara Pas told Mr. Nezowy that he had never

wanted nor authorized him to file for political asylum? A. I was working at my desk. I only remember her asking was the political asylum withdrawn and her husband jumping in the conversation back and forth constantly.

* * *

Trial judge instruction to jury to disregard Kushnir's testimony that she had been threatened by U.S. attorney before grand jury:

[Court Charge commencing at p. 7.175]

* * *

THE COURT: Members of the jury, just before we recessed Miss Kushnir said something about she had been threatened by an Assistant United States Attorney by the name of Howard Finkelstein. I will instruct you to disregard her testimony in that regard.

* * *

Prosecutor cross examination of Kushnir as to her invocation of Fifth Amendment rights before grand jury:

[Cross Examination of Anna Kushnir commencing at p. 7.190]

* * *

BY MS. SPEARING:

Q. Miss Kushnir, did you understand the rights Mr. Finkelstein read to you that day? A. I was very confused because like I said, he interrogated me before we went in.

Q. Did you understand the rights he read to you that day? A. Yes.

Q. Didn't you in fact invoke your Fifth Amendment right that day? A. I'm sorry.

Q. Did you in fact invoke your Fifth Amendment privilege which he advised you of that day? A. Yes.

* * *

Prosecutor reading to trial jury a question before the grand jury informing Kushnir that the grand jury was investigating the charges of violation of 28 U.S.C. §1001:

[Commencing at p. 7.182]

* * *

"Question: Miss Kushnir, before we proceed to your testimony, I would like to advise you of the following. The purpose of your testimony today is so you can provide truthful, honest and complete answers to the questions relevant to a grand jury investigation, which is presently being conducted. That grand jury investigation involves a charge in violation of Title 18, United States

Appendix C

Code, Section 1001, which is false claims to a federal agency. The particulars of the investigation are that an individual — the government believes that an individual has been making false claims to the Immigration and Naturalization Service, a federal agency, in matters of importance to the Immigration and Naturalization Service. In particular, regarding the filing of various political asylum applications on behalf of individuals of the Polish descent, who are residing in the United States as visitors on a B2 Visitor's Visa."

* * *

Prosecutor reading to trial jury that prosecutor before grand jury advised Kushnir that she was a "suspect" of the grand jury investigation:

[Commencing at p. 7.184]

* * *

". . . I also advised you, you should consider yourself a suspect regarding this investigation.

Now, Miss Kushnir, are you represented by counsel?

Answer: No."

* * *

Appendix C

Excerpt of sidebar conference where defense counsel objected to introduction of evidence of Kushnir invocating Fifth Amendment right before grand jury:

* * *

[U.S. Attorney] MS. SPEARING: Your Honor. I would like to inquire into [Kushnir's] taking the Fifth Amendment in the grand jury as to whether or not she answered truthfully in the grand jury. . . .

Your Honor, if we could go back to the reason we asked for the side bar because we wanted to ask Miss Kushnir whether she answered questions or whether she in fact invoked her Fifth Amendment privilege so as to show she understood the advice and so on [U.S. Attorney] Mr. Finkelstein was giving her and is perfectly capable of standing up to the Government, contrary to the implication, and I simply did not want to create reversible error by somehow bringing out any evidence with respect to Fifth Amendment privilege in an improper context. I don't believe that it's improper, but I would like the Court to rule on that.

[Defense Attorney] MR. CARABELLO: It's my contention at this point — and what I intend to do so we can get a ruling immediately is, according to the ruling that you made, your Honor, concerning the testimony that she would —

Appendix C

THE COURT: How does that impeach her credibility?

MR. CARABELLO: Number one, I asked her —

THE COURT: I know what you asked her. How does what she has been asked so far impeach her credibility? . . .

All right, the thing that's before me now is whether the Government can go on and read to her the testimony to bring out by questioning that she invoked her Fifth Amendment privileges and I think the better way to do it, rather than to read it from the statement, would be to ask her and I will permit the Government to ask her that question.

MRS. AINSLIE: Fine.

MR. CARABELLO: Note my objection.

THE COURT: Why are you objecting?

MR. CARABELLO: I think it's prejudicial, your Honor.

* * *

No. 83-1477

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM NEZOWY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether any error in allowing the government's cross-examination of a defense witness, which revealed that the witness had invoked her Fifth Amendment privilege before the grand jury, was harmless in the circumstances of this case.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 723 F.2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1983. The petition for a writ of certiorari was filed on February 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on three counts of making false

statements to the Immigration and Naturalization Service, in violation of 18 U.S.C. 1001 (Counts One, Four and Eight). He was sentenced to a two-year term of imprisonment with parole eligibility after six months on Count One, and to two five-year terms of probation on Counts Four and Eight, all the sentences to run concurrently.[1]

1. The evidence at trial showed that petitioner was associated with Louis Konowal, an attorney who represented clients before the INS. Petitioner acted as an "immigation consultant" on behalf of Polish nationals and, because he was fluent in Polish, would often accompany clients to INS interviews as a translator. Pet. App. 1a. Unbeknownst to Konowal, petitioner filed political asylum applications with INS in the name of clients who were unaware of this action and who specifically had denied petitioner permission to seek political asylum on their behalf (*id.* at 1a-2a, 3a).

In response to complaints about petitioner's activities, INS had arranged for a Polish-speaking INS employee to conduct an applicant interview at which petitioner acted as interpreter for his client (*id.* at 2a). The INS employee testified at trial that petitioner translated the questions he had put to the applicant inaccurately, deleting all references to politi-

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[1] Petitioner was originally indicted on 11 counts of making false statements to the INS. He was acquitted by the jury on three of these counts, the court directed a verdict of acquittal on a fourth count, and four false statement counts were dismissed before trial. Petitioner was also indicted on ten counts of collecting fees for his services in excess of those permitted by law, in violation of 18 U.S.C. 1422. Four of these counts were dismissed before trial, the district court directed a verdict of acquittal on a fifth count, and petitioner was acquitted at trial on all of the remaining counts.

cal asylum and leading the client to believe that the questions dealt with establishment of permanent residence in this country (6 Tr. 21-29).

Petitioner testified on his own behalf, asserting that all of the aliens had authorized him to seek asylum. He also called Anna Kushnir, his part-time secretary, as a defense witness (Pet. App. 3a). The bulk of Kushnir's testimony concerned office practices and accounting procedures employed in petitioner's enterprise with Konowal (*ibid.*). Her testimony was also offered to discredit Konowal's testimony, presented by the government, that he was unaware of petitioner's activities and had derived no fees from them, and to offer an account of portions of interviews between petitioner and two different aliens (*id.* at 3a-4a). In the latter connection, Kushnir stated that she had been present when Marian Grech consented to the filing of a political asylum petition and had heard part of a conversation in which petitioner had assured Barbara Pas Economopoulos that he had withdrawn her political asylum application (*id.* at 4a).

Kushnir also testified that when she appeared before the grand jury as a possible suspect in the investigation of this case, an Assistant United States Attorney had threatened her with denaturalization and deportation if she did not cooperate (Pet. App. 4a). To rebut the claim that Kushnir had been badgered and harassed, the government cross-examined Kushnir about her appearance before the grand jury (*ibid.*; 7 Tr. 186). The prosecutor read from the grand jury transcript a passage in which Kushnir was informed of (1) the object of the grand jury's investigation, (2) her right to refuse to cooperate if to do so might be incriminating, (3) the uses the

grand jury could make of her testimony, (4) her right to counsel, and (5) her status as a suspect in, but not a target of, the investigation (7 Tr. 183-184). Kushnir then acknowledged that she had been so advised (*id.* at 185).

To show further that Kushnir's will had not been overborne, as implied by her testimony, and that she had understood her rights and was "perfectly capable of standing up to the [g]overnment," the government sought to show that Kushnir had heeded the Assistant United States Attorney's advice of rights and had invoked her Fifth Amendment privilege (7 Tr. 188). The district court allowed the testimony for that limited purpose. To confine the inquiry to the invocation of the privilege—to the exclusion of the question that provoked it—the court directed the government not to read the exchange from the transcript of the grand jury proceedings, but simply to ask Kushnir whether she had invoked her Fifth Amendment privilege on the day she appeared before the grand jury. *Id.* at 189. Petitioner's counsel objected to the question but did not request any limiting instruction, either then or as part of the general instructions to the jury. When questioning resumed, Kushnir testified that she had understood the rights of which she had been informed and confirmed that she had invoked her Fifth Amendment privilege (*id.* at 190).

The government did not advert to the subject again. On redirect examination, however, petitioner's counsel returned to the subject and elicited again from Kushnir that she had invoked her Fifth Amendment privilege (7 Tr. 198). In the ensuing examination, Kushnir testified that she had told the Assistant United States Attorney assisting the grand jury that

she "wasn't going to take his threats anymore" (*id.* at 200), had asked for an attorney (*ibid.*), and had informed the magistrate who appointed an attorney for her about the threats that she said had been made (*id.* at 201).

2. On appeal, a divided panel of the court of appeals affirmed. At the outset, the panel majority observed that "there was clearly sufficient evidence to support [petitioner's] convictions" (Pet. App. 2a).[2] The court then turned to the alleged trial error involving Kushnir's cross-examination. The court of appeals held that the government's questioning of a defense trial witness as to whether she had claimed the privilege against self-incrimination in the grand jury proceedings constitutes trial error, subject only to application of the harmless error rule (Pet. App. 8a). "[A] careful examination of the record satisfie[d]" the court, however, that the potential for prejudice to a defendant from such questioning had "not crystallize[d] into that degree of prejudice which * * * would compel a reversal of [petitioner's] conviction" (*id.* at 9a).

In making the harmless error determination, the court of appeals applied the test of *United States* v. *Natale*, 526 F.2d 1160, 1171 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976), which requires a court to evaluate both the remoteness of the witness's testimony to the crime charged and the likelihood that the jury became confused and associated a defendant with a witness' assertion of the privilege (*ibid.*). The court observed that "Kushnir's testimony was

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[2] The court of appeals also rejected petitioner's claim that the trial judge erroneously failed to instruct the jury on concealment and authorization (Pet. App. 3a n.3).

either given full credit when exculpatory, or else was so remote from the crimes charged * * * that the first criterion of the *Natale* rule was fully satisfied" (*id.* at 11a). As for the second prong of the *Natale* rule, the court found it "highly implausible that a jury could have impermissibly imputed Kushnir's invocation of her fifth amendment privilege to [petitioner]" in light of her insignificant position in the office structure, the absence of any suggestion at trial that she was implicated in petitioner's scheme and the brevity of the disputed cross-examination in the midst of a nine-day trial (*id.* at 12a).

Judge Adams dissented (Pet. App. 14a-24a). Initially, he suggested (without deciding) that the harmless error inquiry here is subject to the standard of *Chapman* v. *California*, 386 U.S. 18 (1967), and *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), and that petitioner's conviction could not survive scrutiny under that standard (Pet. App. 17a-23a). (The panel majority responded that, even under *Chapman* and *Fahy*, the error found here was harmless because there was "no reasonable possibility that the questioning of Kushnir might have contributed to the conviction" (Pet. App. 13a n.8).) Judge Adams rested his dissent upon his divergent assessment of the impact of Kushnir's testimony and the likelihood that the jury inferred petitioner's guilt from Kushnir's invocation of her privilege against self-incrimination (*id.* at 23a-24a).

ARGUMENT

1. Petitioner contends (Pet. 11-19) that the court of appeals improperly failed to apply a per se rule that prosecutorial questioning at trial of a defense witness about an assertion of Fifth Amendment privilege during the grand jury proceedings is reversible error. He maintains that such a per se rule is required by this Court's decision in *Grunewald* v. *United States*, 353 U.S. 391 (1957), and that the court of appeals' adoption of the harmless error analysis of *United States* v. *Natale*, 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976), was improper. Petitioner also claims that the circumstances of this case mirror those in *Grunewald* and require reversal of his conviction. These arguments are wholly without merit.

a. In *Grunewald*, defendant Halperin appeared before the grand jury and declined to answer any questions on the ground that the answers would tend to incriminate him. He insisted on his innocence, however, and stated that he refused to answer only on the advice of counsel that answers might furnish evidence that could be used against him. 353 U.S. at 416. At trial, some of these same questions were put to him, and he answered in a manner consistent with innocence. Over objection, the government was then permitted to show that the defendant had asserted his privilege in answer to these questions during the grand jury proceedings. 353 U.S. at 416-417. The court later instructed the jury that the defendant's invocation of the Fifth Amendment could be considered only insofar as it reflected upon the credibility of his trial testimony and could not be used to support an inference of guilt or innocence. 353 U.S. at 417.

This Court held the cross-examination impermissible in "the circumstances of th[e] case" (353 U.S. at 424). What made it impermissible was the district court's failure to consider whether Halperin's prior assertion of the Fifth Amendment could properly be viewed as a prior inconsistent statement, and thus a proper basis for impeachment. Deciding that Halperin's invocation of the privilege was "wholly consistent with innocence" (353 U.S. at 421), this Court found no inconsistency in Halperin's testimony before the grand and petit juries, and concluded that the cross-examination was improper. 353 U.S. at 420-422. Because the cross-examination was not probative on the issue of credibility, the only basis on which it had been allowed, and because there was an unacceptable likelihood that the jury might improperly have treated the assertion of the privilege as an admission of guilt, this Court reversed the conviction on the basis of an evidentiary ruling that ordinarily would be left to the trial court's discretion. 353 U.S. at 423-424.

Plainly *Grunewald* itself does not support petitioner's contention (Pet. 12) that cross-examination with respect to a witness' invocation of Fifth Amendment privilege can never be harmless error. The Court repeatedly emphasized that its decision rested upon the "particular circumstances" of the case before it. 353 U.S. at 420, 421, 424. Moreover, the Court's analysis, which focuses upon the fact-bound question whether the contested cross-examination revealed a prior inconsistency reflecting upon the defendant's credibility, essentially establishes a rule of evidence that is appropriately subject to the harmless error rule. See 28 U.S.C. 2111. The Court also took considerable care to detail the facts of the case that accounted for its conclusion that the cross-

examination in *Grunewald* was prejudicial error. Thus *Grunewald* assuredly does not establish an ironclad rule requiring reversal of a conviction because of cross-examination of a witness as to his invocation of the privilege against self-incrimination.[3]

In any event, in light of *Chapman* v. *California*, 386 U.S. 18 (1967), which holds that even prosecutorial comment upon the failure of the defendant himself to testify, in derogation of the defendant's Fifth Amendment privilege, could be assessed as harmless error under an appropriate standard (see note 4, *infra*), the contention that *Grunewald* admits of no harmless error exception is frivolous. See also *United States* v. *Hasting*, No. 81-1463 (May 23, 1983); cf. *Doyle* v. *Ohio*, 426 U.S. 610, 619-620 (1967) (implying that a harmless error rule may qualify the court's decision that use of a defendant's post-arrest silence to impeach his trial testimony violates due process).[4]

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[3] Indeed Justice Black, joined by Chief Justice Warren, and Justices Douglas and Brennan, wrote separately in *Grunewald* precisely because he was disinclined to "rest [his] conclusion on the special circumstances of this case." 353 U.S. at 425. Even the separate opinion does not purport to preclude application of a harmless error rule, however. Moreover, because the cross-examination at issue in the instant case was not directed at the defendant, Justice Black's conclusion, "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it" (353 U.S. at 425), is simply inapplicable. See page 12, *infra*.

[4] We note that petitioner does not press Judge Adams' suggestion that the constitutional harmless error standard of *Chapman* should have been applied here. Nor did petitioner so argue in the court of appeals (see Pet. C.A. Br. 25-30).

We think it clear that there is no basis for applying the constitutional harmless error standard here. The Court's

Nor, contrary to petitioner's submission (Pet. 16-19), is the decision below contrary to *United States* v. *Natale*, 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976), or *United States* v. *Williams*, 464 F.2d 927 (8th Cir. 1972). Each of the cited cases recognized the possibility that a *Grunewald* error may be harmless. Indeed, as noted above (page 5), the court below applied the standard for harmless error employed in *Natale*.[6] And although the error in *Williams* was adjudged prejudicial, there is no suggestion in the Eighth Circuit's opinion that it had adopted the per se rule advocated by petitioner.

b. Also untenable are petitioner's alternative contentions (Pet. 12-15) that this case is factually indistinguishable from *Grunewald* and that the court of appeals misapplied *Grunewald* by failing to consider in its harmless error analysis the particular

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decision in *Grunewald* rests essentially upon the conclusion that the defendant's invocation of his privilege against self-incrimination was irrelevant because it was not inconsistent with his later avowals of innocence (see 353 U.S. at 421-423), not upon any view that the cross-examination of the defendant impermissibly burdened the Fifth Amendment privilege. Compare pages 8-9, *supra*. And as previously noted, even if *Grunewald* were regarded as grounded on the constitutional rights of defendants, no basis for application of a constitutional harmless error rule would exist in a case such as this, where the only arguable infringement of constitutional privilege was suffered by a non-defendant witness. As to the defendant, the issue is plainly one to be determined by conventional evidentiary standards of harmless error.

[6] Petitioner's assertion (Pet. 17-19) that the *Natale* test for harmless error was misapplied rests upon his failure to distinguish between two distinct questions addressed separately in *Natale*: whether examination of a witness is impermissible under *Grunewald*; and whether any error is harmless. See 526 F.2d at 1171.

circumstances that led the *Grunewald* Court to find that the cross-examination in that case was impermissible. Petitioner's rendition of those factors is highly selective and incomplete. Compare Pet. 13-14 with 353 U.S. at 421-423 (see pages 7-8, *supra*). More to the point, however, is that the Court did not purport in *Grunewald* to explore the factors pertinent to an assessment of harmless error; the factual considerations emphasized were relevant to the threshold evidentiary question whether the contested cross-examination disclosed a prior inconsistent statement, and, if so, whether the potential for prejudice outweighed any probative value in the examination. 353 U.S. at 420, 424; cf. Fed. R. Evid. 403. By contrast, the inquiry under a harmless error analysis is whether, notwithstanding the conclusion that a trial error occurred, the conviction should stand because the error can be said, with an appropriate degree of confidence, to have made no difference in the outcome.

In any event, this case is readily distinguishable from *Grunewald*. *Grunewald* teaches that invocation of the privilege against self-incrimination is not inconsistent with a defendant's testimony at trial asserting innocence. Here, however, the witness's acknowledgement that she had invoked her Fifth Amendment privilege was not employed to impeach trial testimony bearing on guilt or innocence, but to rebut the witness's suggestion that she had been browbeaten by the prosecutor. The testimony elicited here thus appears in fact to have been relevant to the point in support of which it was adduced, and it is in our view doubtful that any error was committed. Cf. *United States* v. *Hasting*, slip op. 2-4 (Stevens, J., concurring). While the court of appeals nevertheless concluded that the probative value of the disputed

cross examination was limited and that it was outweighed by the potential for prejudice to the defendant (Pet. App. 7a-8a), it is at least clear that *Grunewald* is not controlling here.

Moreover, the court of appeals appears to have overlooked, in this branch of its analysis, the fact that the challenged cross-examination was not of the defendant and that the potential for prejudice here accordingly is significantly less than that in *Grunewald*; it is highly unlikely that a jury would infer from a witness's invocation of the Fifth Amendment that the defendant is guilty. Compare 353 U.S. at 423-424. Thus, it is far from clear that any error was made by the district court; assuredly then *Grunewald* does not preclude a finding of harmless error here.[6]

2. Petitioner also argues (Pet. 20-21) that the admission of the evidence in question was not in fact harmless. He relies for this contention on the factual analysis of the dissenting court of appeals judge. This is a fact-bound question that merits no further review by this Court.

In any case, the harmless error finding is clearly supported by the record. Petitioner was acquitted on all counts of accepting fees beyond the legal limit for his services and on three of six counts of making false statements to the INS. As the court of appeals noted, the "dispositive inquiry" on the false statement counts was "whether the *clients* for whom asylum

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[6] Although the court of appeals concluded that it was error to allow the disputed question on cross-examination, its harmless error ruling rests in part upon much the same considerations as those adduced in text to distinguish *Grunewald* (see Pet. App. 9a-12a).

was sought authorized the activity." Pet. App. 10a (emphasis in original). Kushnir gave relevant testimony regarding the statements of only two clients—Marian Grech and Barbara Pas Economopoulos. Kushnir testified that Grech gave petitioner permission to file for political asylum on his behalf, and the jury *acquitted* him on that count (*id.* at 10a-11a) .

Kushnir also testified that she heard [petitioner] assure Economopoulos that he had withdrawn her political asylum application (Pet. App. 4a). Although petitioner was convicted on that count, the record makes clear that any impeachment of Kushnir could not have been critical to this outcome. First, Kushnir's testimony was not wholly exculpatory; that petitioner had withdrawn Economopoulos's application did not overcome the fact that he had filed it contrary to her instructions. In fact, petitioner withdrew the political asylum application only after Economopoulos made complaints about his activities to the INS. Second, the conversation Kushnir claimed to have overheard among petitioner, Ms. Economopoulos and her husband was tape recorded by the Economopouloses, and the jury was accordingly able to assess the import of that conversation based on highly reliable independent evidence. Kushnir's testimony was, in this respect, superfluous. Finally, Kushnir's testimony that Ms. Economopoulos met initially with Konowal rather than petitioner (set Pet. App. 24a) was not necessarily exculpatory and was contradicted by Ms. Economopoulos (2 Tr. 82-83) and by the testimony that Konowal spoke no Russian or Polish and Economopoulos spoke very poor English.

Thus, as the court of appeals observed, the only genuinely exculpatory testimony that Kushnir provided was fully credited, the remainder of her testi-

mony was "at best tangential to the relevant issues," and any taint on her credibility "could not have worked to the detriment of [petitioner]" (Pet. App. 11a). Moreover, it is highly unlikely that the jury linked Kushnir's invocation of her Fifth Amendment privilege before the grand jury to petitioner in the absence of any suggestion at trial that she was implicated in his scheme, especially given the brevity of the challenged cross-examination in the setting of a nine-day trial, and the lack of any connection between Kushnir's assertion of privilege and any testimony she gave bearing upon petitioner's guilt or innocence. See Pet. App. 12a. The court of appeals' conclusion that any error was harmless in this case accordingly is clearly correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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